APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 81-1290

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DON MARTIN, DOMA CORPORATION and
CAPROCK SERVICES CO[illegible]NY,
Defendants-Appellants.

Aug. 13, 1982

Appeal from the United States District Court
for the Northern District of Texas

Before CLARK, Chief Judge and GEE and GARZA, Circuit Judges.

PER CURIAM:

The defendants appeal the district court's dismissal without prejudice of a nine count indictment charging them with mail fraud. They contend the dismissal should have been with prejudice. Because there has been no final decision within the meaning of 28 U.S.C. § 1291, we dismiss for lack of jurisdiction.

The essential facts necessary to understand today's disposition are as follows. The defendants were investigated concerning fraudulent oil transactions. It was alleged that they invoiced a customer for virgin crude oil when in fact they had delivered lesser quality oil. During the course of investigations by the Departments of Energy and Justice and a grand jury, legal counsel for the defendants, Reagan Martin, divulged information implicat-

ing his clients. They were subsequently indicted. The district court found Martin's testimony to be a clear breach of the attorney-client privilege. The court granted the defendants' motion to dismiss the indictment, finding that this breach denied the defendants their right to effective assistance of counsel as guaranteed by the sixth amendment, and a denial of due process as guaranteed by the fifth amendment. However, the dismissal was without prejudice to the government's right to seek a new indictment based on evidence not based on or derived from any breach of the attorney-client privilege. The defendants filed this appeal, asserting that a dismissal with prejudice was the only appropriate remedy for the constitutional violations found. The government also appealed the dismissal of the indictment but withdrew its appeal. It then filed a motion to dismiss the defendants' appeal which we now consider. While that motion was pending before this court, the government obtained a new indictment of Don Martin.[1]

In the context of a criminal prosecution, finality normally comes with the imposition of sentence. *Flynt v. Ohio*, 451 U.S. 619, 101 S.Ct. 1958, 1959, 68 L.Ed.2d 489 (1981); *Parr v. United States*, 225 F.2d 329 (5th Cir. 1955), *aff'd*, 351 U.S. 513, 518, 76 S.Ct. 912, 916, 100 L.Ed. 1377 (1956). The matter which the dismissed indictment sought to put in controversy here was the defendants' guilt of the crime of mail fraud. *See Parr v. United States*, 225 F.2d at 332. Dismissal of the indictment prevented that issue from being reached. Since it was not reached or decided there is nothing from which to appeal. Whether the dismissal leaves the defendants open to further prosecution or whether the dismissal ought to bar prosecution altogether has no effect on appealability.

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[1] The government moved to dismiss the appeal of the defendant corporations as moot based on the fact that they were not reindicted by the grand jury and would not be prosecuted further by the government. We need not decide this issue.

Parr v. United States, 351 U.S. at 517, 76 S.Ct. at 915. Any testing of the dismissal order must abide the outcome of a trial on the issue of guilt. Then, if convicted, the defendants may be aggrieved. *Id. See United States v. Lanham*, 631 F.2d 356 (4th Cir. 1980) (dismissal of indictment without prejudice not appealable, citing *Parr v. United States*). *See also United States v. Arzate*, 545 F.2d 481 (5th Cir. 1977).

The defendants' claim that this situation comes within the collateral order exception to the final judgment rule first announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), is untenable. To begin with, the major decisions applying *Cohen* to criminal cases have involved *denials* of motions to dismiss indictments. *See, e.g., United States v. MacDonald*, 435 U.S. 850, 851, 98 S.Ct. 1547, 1548, 56 L.Ed. 2d 18 (1978) (denial of motion to dismiss based on speedy trial grounds); *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) (denial of motion to dismiss based on double jeopardy grounds). A denial of a motion to dismiss leaves a defendant in the throes of a prosecution. It is therefore distinguishable from a dismissal, the effect of which is to leave the matter as if no suit had been filed. While the denial of a motion to dismiss may leave a defendant aggrieved, a dismissal does not. Arguably, appealability may be undercut by this alone. *See Parr v. United States*, 351 U.S. at 517, 76 S.Ct. at 915.

Putting aside the question of "aggrievement," application of the factors announced in *Cohen* does not support jurisdiction here. These factors are: 1) the order must fully dispose of the matter in dispute; 2) the order must not be simply a step toward final disposition of the merits of the case which would be merged in final judgment; rather it must resolve an issue completely separable from and collateral to the cause of action asserted; and 3) the decision must involve an important right which would be

lost irreparably if review had to await final judgment. 337 U.S. at 546, 69 S.Ct. at 1225. *See Abney v. United States*, 431 U.S. at 658-59, 97 S.Ct. at 2039-2040 (summarizing the *Cohen* factors). *Abney* found all of the Cohen factors present in order to support appellate jurisdiction. We have disallowed appeals where less than all of the factors were present. *United States v. Rey*, 641 F.2d 222, 224 (5th Cir.), *cert. denied*, —— U.S. ——, 102 S.Ct. 318, 70 L.Ed.2d 160 (1981).

Such a situation is present here. As in *Rey*, the first factor is met—the district court conclusively determined that the defendants' constitutional rights were violated. Likewise, the dismissal of the indictment fully disposed of that indictment. However, neither of the other two *Cohen* factors are present.

Defendants complain that the government has obtained evidence from the breach of the attorney-client privilege. The complaint is not well taken. For purposes of appealability, this case is indistinguishable from the denial of a suppression motion. Both situations address the issue of what evidence the government has procured, and how it has procured it. Evidentiary issues in criminal cases are normally intertwined with the basic issue of guilt. *Cohen* requires the dispute to be completely collateral. For this reason appeals may not be taken from the denial of pre-trial motions to suppress evidence. *Di Bella v. United States*, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962); *Cogen v. United States*, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275 (1929); *United States v. Mock*, 604 F.2d 336, 339 (5th Cir. 1979). Because the issue here ultimately concerns what evidence will be used against the defendant, we apply the same rule, even though this case is cast in sixth rather than fourth amendment terms. The defendants assert that the wrongful acts of their attorney, and the government's exploitation of those acts, have prejudiced the conduct of their defense. But this complaint is intertwined with guilt. It is not clearly col-

lateral. *United States v. MacDonald*, 435 U.S. 850, 859, 98 S.Ct. 1547, 1552, 56 L.Ed.2d 18 (1978) (denial of motion to dismiss on sixth amendment speedy trial grounds not appealable).

Cohen's third factor is not met either. The defendants do not claim, nor could they, a right not to be indicted a second time. *Compare Abney v. United States*, 431 U.S. 651, 659-660, 97 S.Ct. 2034, 2040-2041, 52 L.Ed.2d 651 (1977) (the denial of dismissal on double jeopardy grounds is appealable under *Cohen* because the denial order is collateral to guilt and the defendant's right not to be tried twice would be lost absent appeal). Rather, "the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Parr v. United States*, 351 U.S. at 519-20, 76 S.Ct. at 916-917.

Similarly, the defendants' and amicus' claim of government misconduct in knowingly exploiting the breach of the attorney-client privilege is neither separable from the issue of guilt, nor an issue which cannot be dealt with fully and fairly on an appeal from judgment. *United States v. Rey*, 641 F.2d 222, 224 (5th Cir. 1981); *United States v. Gregory*, 656 F.2d 1132, 1135-36 (5th Cir. 1981) (denial of motion to dismiss based on prosecutorial vindictiveness not appealable).

The third factor in *Cohen* requires that the district court's decision involve an important right which would be lost without immediate appellate review. 337 U.S. at 546, 69 S.Ct. at 1225. The defendants argue that they meet this factor because they will be irreparably harmed by the further disclosure of privileged information in a second prosecution, or by further use of information already disclosed. That is not the case. The defendants acknowledge that the dismissal without prejudice left the parties as if no action had ever been filed. The district court explicitly restricted the government in the scope of evidence it could use to seek a second indictment. In

terms of trial, the defendants have available to them all the legal tools for preventing unwarranted disclosures that any defendant would have. The proper use of those tools is addressed to the district court during the course of the new proceedings. To the extent damaging disclosures have already been made public, no appeal, now or later, can aid the defendants.

Finally, the defendants argue that they have been greatly inconvenienced by the government's belated motion to dismiss. They contend also that having prepared briefs, both parties' convenience will be served by allowance of this appeal. These arguments miss the mark. This is a court of limited statutory jurisdiction. Neither the convenience of parties nor court may confer the right of review. *United States v. MacDonald*, 435 U.S. at 857 n.6, 98 S.Ct. at 1551 n.6.

APPEAL DISMISSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS ABILENE DIVISION

Criminal No. CR-1-81-1

UNITED STATES OF AMERICA

v.

DON M. MARTIN, DOMA CORPORATION AND CAPROCK SERVICES COMPANY, INC.

ORDER

Defendants have filed motions, with supporting briefs, and the government has filed briefs in opposition to said motions. Two hearings have been held, the second being in Lubbock, Texas on the 16th and 17th days of April, 1981, with all counsel present. After hearing and considering the motions, the briefs and arguments of counsel, the court enters the following orders:

I

The motions by the corporate defendants to adopt motions filed by the individual defendant is GRANTED.

II

The motion of the defendants to dismiss the indictment for duplicitousness is DENIED.

III

The motion of the defendants to dismiss the indictment on the grounds that 18 U.S.C. § 1341 has been preempted by the Congressional enactment of the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. §§ 752, *et seq.*, is DENIED.

United States of America v. Lang, —— F.2d —— (TEC 1981).

IV

The motion of the defendants to dismiss the indictment for failure of the indictment to charge an offense is DENIED.

V

The Motions Of The Defendants To Dismiss The Indictment For Violation Of The Defendants' Fifth and Sixth Amendment Rights

This case involves a nine-count indictment charging the defendants with violations of 18 U.S.C. § 1341 and § 2 with respect to the nine allegedly fraudulent invoices mailed on separate dates to Cosden Oil & Chemical Company (Cosden) of Big Springs, Texas. In brief, the indictment alleges that instead of delivering crude oil as represented by the invoices, defendants actually delivered HIFO, a product having a less value than crude oil; defendants then charged Cosden, the purchaser, for the higher priced crude.

The sequence of events, as shown by the evidence at the evidentiary hearing on this motion, and which is necessary to determine this motion, is as follows:

In 1973 Defendant DOMA Corporation, located in Abilene, Texas, was incorporated by Defendant Don Martin and his cousin Reagan Martin who is not subject to the indictment. Each of the Martins owned fifty percent of

the stock in DOMA.[1] The other corporate defendant, Caprock Services Company, Inc., was subsequently acquired by DOMA as a wholly-owned subsidiary.

Since incorporation, Don Martin has been the president and chief operating officer of DOMA while Reagan Martin has served as chairman of the board, vice president, and secretary-treasurer. Additionally Reagan Martin has acted as the attorney for the corporation which has included duties such as maintaining the corporate records, counselling on business decisions, negotiating agreements with DOMA and others, and arranging financing when needed for DOMA. The record also indicates that Reagan Martin handled the preparation of division orders, determined ownership of the crude purchased, and supervised and secured the services of other attorneys when he desired outside legal assistance.

Aside from his role as corporate counsel, Reagan Martin also acted as personal counsel for Don Martin commencing in 1971. He has been a member of the Texas Bar since 1961 and although his offices are located in Dallas, Texas he visited Abilene on several occasions to attend to the affairs of DOMA as well as those of Don Martin. Reagan Martin's representation of Don Martin as an individual consisted of consultation concerning a will, a trust agreement, a real estate transaction, and a sale by Compton Corporation of various properties which eventually ended up in DOMA.

In July of 1978, Cosden disputed one of the invoices sent by DOMA stating that HIFO had been delivered rather than the crude oil which was purchased. When this matter was called to the attention of Don Martin he immediately requested Reagan Martin to come to Abilene. Reagan Martin arrived in Abilene within two or three days and consulted with Don Martin about Cosden's alle-

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[1] Reagan Martin controlled this stock although it was actually in trust for his children.

gations. Although it was in dispute at the hearing, the court determined that the conversations between Don Martin and Reagan Martin on this occasion were between the two of them alone to the exclusion of any third party. This finding is in accordance with the testimony of Doug Grissom, a former employee of DOMA. During this July meeting, Reagan Martin inquired as to the nature of the allegations by Cosden and asked if there was an accident or other innocent mistake. He finally advised that DOMA issue a credit memo to Cosden in the amount of $90,000.00. In counselling with Don Martin, he indicated that by issuing the credit memo civil litigation as well as criminal charges could be avoided.

The Department of Energy (DOE) commenced an audit of the affairs of the defendants which resulted in hearings before the DOE on October 24, 1978 and April 10, 1979. Reagan Martin and Don Martin were present at both hearings and the record is clear that at each hearing Don Martin acknowledged Reagan Martin as his attorney and Reagan Martin did in fact represent Don Martin as an attorney in these hearings. While testifying at the DOE hearings, Reagan Martin, as counsel, revealed, at least in part, the private conversations and consultations he had with Don Martin in July of 1978.

The firm of Williams and Connolly, Washington, D.C., was subsequently employed to represent all three of the defendants herein and also Reagan Martin. Three meetings were held on February 25, 1980, March 19, 1980, and July 23, 1980, with the defendants; Reagan Martin and his attorney; and members of the firm of Williams and Connolly in attendance. These meetings were for the purpose of preparing the joint defense of all of the parties with respect to anticipated criminal charges.

Finally, this unusual sequence of events culminated with the appearance of Reagan Martin before a grand jury on August 6, 1980. On that occasion Reagan Martin

gave sworn testimony relating to his conversations and advice to Don Martin in the July 1978 meeting. This testimony has been examined by the court and without doubt it had a very strong influence or perhaps the principal influence on the grand jury in returning the indictment in question. His testimony was extremely incriminating as to each of the defendants. It is unclear whether Reagan Martin revealed to the grand jury any of the conversations, advice or counsel that were received from the joint defense meetings with Williams and Connolly. However, it appears there is a presumption that subsequent testimony, following consultations with an attorney, would have revealed confidences protected under the attorney-client privilege. *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83 (5th Cir. 1976).

Defendants have moved to dismiss the indictment contending violations of their Fifth and Sixth Amendment rights. Specifically, the defendants claim that Reagan Martin breached the attorney-client privilege by divulging information given to him in the July 1978 meeting and the joint defense meetings. The final contention is that Reagan Martin, while representing the defendants as their attorney, was hopelessly caught in a conflict of interest. He allegedly failed to advise his clients of their right to claim the privilege and when testifying under oath gave facts which exonerated him from criminal liability but which incriminated the defendants. These actions are alleged by the defendants to constitute ineffective assistance of counsel and a denial of due process in violation of the Fifth and Sixth Amendment to the Constitution of the United States.

Based upon the following findings, the court agrees with defendants and finds the motion to dismiss has merit and should be granted.

Reagan Martin was the corporate counsel for the two corporate defendants in this case and was representing them as counsel from the date of incorporation of DOMA

through the date of his testimony before the grand jury on August 6, 1980.

Reagan Martin was also counsel for Don Martin, and as his personal attorney, represented him on many occasions including the hearings before the DOE. The court finds that he acted as lawyer and counsel for Don Martin personally and the two corporate defendants in July of 1978 when he was called to Abilene to advise with respect to the allegations received from Cosden. While it is recognized that Reagan Martin has a business interest in these transactions, he was acting in the capacity of an attorney at law on behalf of the defendants in this case and advised them as to a course of action to be taken both civilly and as a possible way to avoid criminal charges. *See e.g. U.S. v. Lipshy*, 492 F.Supp. 35 (N.D. Tex. 1979).

The government's contention that these defendants have waived their right to assert the attorney-client privilege is not supported by the evidence. Without determining whether the privilege may have been waived by Don Martin's attendance at the DOE hearings and his silence on that occasion, there is no evidence of any waiver of the privilege when Reagan Martin testified before the grand jury. Even had there been a waiver of the privilege at the DOE hearings, which the court does not find one way or the other, there still is no evidence of any waiver with respect to the confidences divulged during the joint defense conferences with the firm of Williams and Connolly. The court concludes it is reasonable to believe that the facts and law were fully discussed at these conferences and therefore, it is also reasonable to believe that Reagan Martin, in telling his full story before the grand jury, did reveal a portion of either the thought processes or the facts discussed in the joint defense conferences.

In addition to violating the attorney-client privilege, Reagan Martin also violated the canons of ethics by purposefully involving himself in a serious conflict of interest situation. Such conflict arose when Reagan Martin, as an

attorney for the defendants, sought to give his statement to an agent of the FBI and to present his testimony before the grand jury. His statements on these occasions were clearly made for the purpose of exonerating himself from any criminal liability, and as indicated above did incriminate his clients.

The Sixth Amendment provides that the accused shall enjoy the right to have assistance of counsel. Free two-way communications between attorney and client is essential if the professional assistance guaranteed by the Sixth Amendment is to be meaningful. *U.S. v. Morrison*, 49 U.S.L.W. 4087 (Jan. 13, 1981); *U.S. v. Levy*, 577 F.2d 200, 209 (3rd Cir. 1978). When a lawyer testifies as to his communications with his client, as did Reagan Martin in this case, with no waiver from the client of the privilege, and at the same time gives testimony in behalf of his own interests and against those of his clients, such actions amount to a deprivation of effective assistance of counsel to the clients and a resulting denial of these clients' Fifth and Sixth Amendment rights. *See Weatherford v. Bursey*, 409 U.S. 545 (1977). There is no doubt the defendants have been prejudiced by this abrogation of the attorney-client privilege and conflict of interest especially since the communications revealed to the government and the grand jury resulted in the return of the indictment. *See U.S. v. Kilkrain*, 566 F.2d 979 (5th Cir. 1978) *cert. denied* 439 U.S. 819; *U.S. v. Franklin*, 598 F.2d 954 (5th Cir. 1979) *cert. denied* 444 U.S. 870.

The unique turn of events has resulted in prejudice to the defendants and has denied them fundamental rights under the Constitution. *Messalt v. Alabama*, 595 F.2d 247 (5th Cir. 1979); *U.S. v. Morrison*, *supra*; *U.S. v. Levy*, *supra*. Therefore, in the face of this record, the court, exercising its supervisory powers, must dismiss the indictment for the taint that has been placed on all of these proceedings by the privilege violation and the conflict of interest.

Evidence in the record indicates to the court that before the grand jury testimony of Reagan Martin, and before his statement to the FBI, that the facts of his testimony were already well known to the government. Further the government has indicated that they did not intend to use any of the testimony obtained at the DOE hearings. If the government has in fact obtained sufficient information to indict without the use of the testimony of Reagan Martin, justice requires that this dismissal be made without prejudice.

It is therefore ordered that the indictment by the Grand Jury in this case against each defendant be quashed and dismissed without prejudice.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 23rd day of April, A.D. 1981.

HALBERT O. WOODWARD
Chief Judge
Northern District of Texas